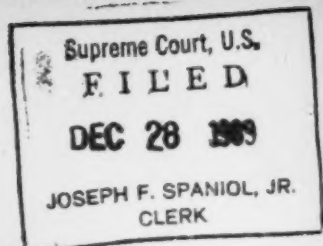


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No. 89-904



IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1989

CARL MICHAEL FORRESTER, SR.,  
*Petitioner,*

v.

THE STATE OF OHIO,  
*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF OHIO**

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**RESPONDENT'S BRIEF IN OPPOSITION**

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IN THE

Supreme Court of the United States

OCTOBER TERM 1953

CARL MICHAEL FORRESTER SR.

Respondent

THE STATE OF OHIO

Appellant

PETITION FOR WRIT OF HABEAS CORPUS TO THE  
SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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## **QUESTIONS PRESENTED FOR REVIEW**

- I. IN A CASE INVOLVING A STATE FELONY MAY A STATE TRIAL COURT UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION ALLOW THE AMENDMENT OF AN INDICTMENT AT TRIAL WHEN THERE IS NO CHANGE IN THE IDENTITY OR NAME OF THE CRIME CHARGE?
- II. IN A CASE INVOLVING A STATE FELONY, MAY A STATE TRIAL COURT DENY ACCESS TO WITNESS'S GRAND JURY STATEMENTS WHERE THERE HAS BEEN NO SHOWING OF PARTICULARIZED NEED?

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*Respondent.*

**OPINIONS BELOW**

The opinions of the Morgan County Court of Common Pleas, The Court of Appeals for the Fifth Appellate District of Ohio, and of the Ohio supreme Court are adequately set forth in the Petition.

**JURISDICTION**

Jurisdiction is claimed by the petitioner under 28 U.S.C. 1257(a). However, respondent denies that there is any substantial constitutional question presented.

**CONSTITUTIONAL PROVISIONS**

The Fifth, Sixth, and Fourteenth Amendments are adequately set forth in the petition.

## STATEMENT OF THE CASE

On March 20, 1987, Petitioner was charged by Indictment with child endangering and involuntary manslaughter in the death of his son, Carl Michael Forrester, Jr. In pretrial discovery, Petitioner's counsel requested the transcription and production of the Grand Jury testimony of all witnesses who testified at that proceeding, whether or not they were to be called at trial. Petitioner's counsel argued for the production of all transcripts of all witnesses who appeared before the Grand Jury. The Court denied Petitioner's request finding that a particularized need was not shown except for that of the forensic pathologist, Dr. Larry Tate. Petitioner's counsel did not request any continuance when the Indictment was amended prior to trial to add the element of "recklessness" pursuant to the Ohio Rules of Criminal Procedure. Trial proceeded and Petitioner was convicted on both counts of the the Indictment on March 23, 1988. On June 8, 1988 Petitioner was sentenced to imprisonment for involuntary manslaughter for a period of five to twenty-five (5 to 25) years.

In the Fifth District Court of Appeals for the State of Ohio, both of the assignments of error presented to this Court were overruled. The Court of Appeals found *State v. O'Brien* (1987) 30 O.S. 3d 122 to be expressly controlling concerning the amendment of the Indictment. The Court further found that Petitioner had demonstrated no particularized need for any examination of the Grand Jury testimony of the witnesses. The Court found expressly that the case of *State v. Daniels*, (1982) 1 O.S. 3d 69 was inapplicable as it dealt with statements to a law enforcement officer rather than Grand Jury Testimony.



## REASON WHY THE PETITION SHOULD BE DENIED

1. The Indictment was properly amended pursuant to Ohio Law and does not involve a constitutional question.

It is a basic fundamental right to have someone answer only to a felony which has been returned by a Grand Jury. The case of *Stirone v. United States* (1960) 361 U.S. 212 which Petitioner cites is inapplicable. In that case the Defendant was to be tried on conspiracy concerning sand importation but instead was tried concerning steel rather than sand. In the present case Defendant was charged with child endangering and involuntary manslaughter and was tried on child endangering and involuntary manslaughter. The case of *State v. O'Brien* (1987) 30 O.S. 3d 122 governs in this matter. The syllabus in that case reads as follows:

"1. The culpable mental state of recklessly is an essential element of the crime of endangering children under Revised Code 2919.22(b)(3). (*State v. Adams* (1980) 62 O.S. 2d 151; 16 O. Opin. 3d 169; 404 N.E. 2d 144 paragraph 1 of the syllabus approved and followed.)

2. An Indictment, which does not contain all of the essential elements of an offense may be amended to include the omitted element if the name or the identity of the crime is not changed, and the accused has not been misled or prejudiced by the omission of such element from the Indictment. (Crim. R. 7(D) construed and applied.)"

The *O'Brien* court dealt directly with this point.

"Failure to include the element of 'recklessness' in an Indictment for Endangering Children in no way alters

either the name, identity, or severity of the offense charged. "*O'Brien* page 127. The case of *State v. Headley* (1983) 6 O.S. 3d 475 is not applicable. That was a drug offense in which by adding the name of the drug it changed the level of the crime. That particular Ohio Statute would allow possession of a drug to be anything from a minor misdemeanor to a fourth degree felony depending upon the drug possessed. Here the amendment changed neither the identity nor the penalty level of the crime. Likewise the case of *State v. Wozniak* (1961) 172 O.S. 517 is distinguishable. There the words "intent to steal property" were contained in the statute at that time whereas the word "reckless" is not contained in the child endangering statute.

The *O'Brien* case is totally controlling on this matter of State Law. On the matter of Federal Law the Indictment was returned by a Grand Jury and Defendant stood trial on that charge.

As the Court of Appeals stated: "In the disputed fact as to whether the child was struck or whether a helpful parent shook the child, the jury chose to believe the creditability of Dr. Tate and to disbelieve the creditability of the Defendant. Dr. Tate did state within a reasonable medical certainty that the child had died due to blunt force trauma to the head. This was irreconcilable with any reasonable theory of the Defendant's innocence." Wherefore Respondent asks this Court to not grant the writ if there is not serious constitutional question to be reviewed.

Ohio Criminal Rule 7(D) permits amendment of an Indictment as long as there is "no change is made in the name or identity of the crime charge." This has been repeatedly held to past constitutional standards as even

Federal Courts have said that an Indictment may be amended when the Defendant is not misled in any sense, is not subject to any added burden and is not otherwise prejudiced. *United States v. Kegler* (1984) DC) 724 F 2d 190.

2. There is no right to inspect Grand Jury statements of Witnesses.

The providing of Grand Jury testimony is governed not by Criminal Rule 16 for Discovery but is governed by Criminal Rule 6 applying to Grand Jury. The Ohio Rules are very similar although not the same as the Federal Rules. The case of *Dennis v. United States* (1966) 384 U.S. 855 is inapplicable as this Court was there interpreting the Federal Rules of Criminal Procedure as to a "particularized need".

It is obvious that Petitioner's counsel wished discovery, not a particularized need, when he stated (at the transcript, page 313, line 24) "I wanted, obviously, Dr. Tate's for preparation prior to trial." 18 U.S.C.S. Section 3500(e) includes Grand Jury testimony as statements to be given to Defense Counsel after a witness testifies. This is in the Federal definition of statement. There is no such applicable or comparable portion of the Ohio Rules and it is not a constitutional question.

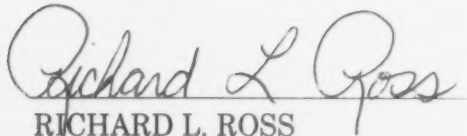
Particularized need is set forth by this Court at a time when the Federal Rules more closely resembled the Ohio Rules of today. *Pittsburg Plate Glass Company v. U.S.* (1959) 360 U.S. 395. The *Jencks* case had to deal with statements in possession of the government not the testimony before the Grand Jury. *Jencks v. U.S.* (1957) 353 U.S. 657. Grand Jury testimony is only to be disclosed if "a compelling necessity shown with particularity" is done

by defense counsel. *U.S. v. Proctor & Gamble Company* (1958) 356 U.S. 677. Here both the Trial Court and the Appellate Court found that there was no particularized need set forth by Petitioner's counsel. There still is a continued need for particularized need before disclosure of Grand Jury testimony. *Smith v. U.S.* (1975) 423 U.S. 1303.

**CONCLUSION**

For the foregoing reasons, respondent requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

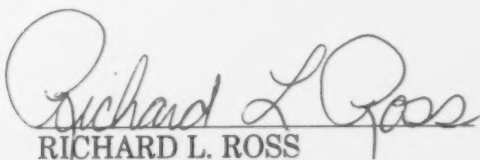
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**COUNSEL OF RECORD**

**CERTIFICATE OF SERVICE**

Pursuant to Rule 28 of the Rules of Practice of this Court, I, Richard L. Ross, a member of the Bar of this Court, hereby certify that on the 28th day of Dec 1989, three copies of respondent's Brief in Opposition to Petition for Writ of Certiorari in the above entitled case were served upon the petitioner by United States Mail, first class, postage prepaid, addressed to Richard D. Welch, Grieser, Schafer, Blumenstiel & Slane Co., L.P.A. 261 West Johnstown Road, Columbus, Ohio 43230, Counsel of Record for petitioner. I further certify that all parties required to be served have been served.

A handwritten signature in cursive script, reading "Richard L. Ross", written over a horizontal line.

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Appendix A

**Rule 6. The Grand Jury**

(A) Summoning grand juries. The judge of the court of common pleas for each county, or the administrative judge of the general division in a multi-judge court of common pleas or a judge designated by him, shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of nine members, including the foreman, plus not more than five alternates.

(B) Objections to grand jury and to grand jurors.

(1) Challenges. The prosecuting attorney, or the attorney for a defendant who has been held to answer in the court of common pleas, may challenge the array of jurors or an individual juror on the ground that the grand jury or individual juror was not selected, drawn, or summoned in accordance with the statutes of this state. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) Motion to dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified, if it appears from the record kept pursuant to subdivision (C) that seven or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(C) Foreman and deputy foreman. The court may appoint any qualified elector or one of the jurors to be foreman and one of the jurors to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the num-

ber of jurors concurring in the finding of every indictment and shall upon the return of the indictment file the record with the clerk of court, but the record shall not be made public except on order of the court. During the absence or disqualification of the foreman, the deputy foreman shall act as foreman.

(D) Who may be present. The prosecuting attorney, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session. but no person other than the jurors may be present while the grand jury is deliberating or voting.

(E) Secrecy of proceedings and disclosure. Deliberations of the grand jury and the vote of any grand juror shall not be disclosed. Disclosed. Disclosure of other matters occurring before the grand jury may be made to the prosecuting attorney for use in the performance of his duties. A grand juror, prosecuting attorney, interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No grand juror, officer of the court, or other person shall disclose that an indictment has been found against a person before such indictment is filed and the case docketed. The court may direct that an indictment shall be kept secret until the defendant is in custody or has been released pursuant to Rule 46. In that event the clerk shall seal the indictment, the indictment shall not be docketed by name until after the



apprehension of the accused, *and no person* shall disclose the finding of the indictment except when necessary for the issuance of a warrant or summons. No obligation of secrecy may be imposed upon any person except in accordance with this rule.

(F) Finding and return of indictment. An indictment may be found only upon the concurrence of seven or more jurors. When so found the foreman or deputy foreman shall sign the indictment as foreman or deputy foreman. The indictment shall be returned by the foreman or deputy foreman to a judge of the court of common pleas and filed with the clerk who shall endorse thereon the date of filing and enter each case upon the appearance and trial dockets. If the defendant is in custody or has been released pursuant to Rule 46 and seven jurors do not concur in finding an indictment, the foreman shall so report to the court forth with.

(G) Discharge and excuse. A grand jury shall serve until discharged by the court. A grand jury may serve for four months, but the court upon a showing of good cause by the prosecuting attorney may order a grand jury to serve more than four months but not more than nine months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another eligible person in place of the juror excused.

(H) Alternate grand jurors. The court may order that not more than five grand jurors, in addition to the regular grand jury, be called, impanelled and sit as alternate grand jurors. Alternate grand jurors, in the order in which they are called, shall replace grand jurors who, prior to the time the grand jury votes on an indictment, are found to be unable or disqualified to perform their duties. Alternate grand jurors shall be drawn in the same

manner, shall have the same qualifications, shall be subjected to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular grand jurors. Alternate grand jurors may sit with the regular grand jury, but shall not be present when the grand jury deliberates and votes.